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IN THE

Supreme Court of the United States

October Term, 1965

No. 146

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTE:

National Labor Relations Act, as amended:
Section 8(b)(4) 2, 3, 5, 9, 10, 11, 13

MISCELLANEOUS:

Report of the General Subcommittee on Labor, Committee on Education and Labor of the House of Representatives, *Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process*, 88th Cong., 2nd Sess. (Comm. Print 1965) 7

IN THE

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No.

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Milk Drivers and Dairy Employees Local Union No. 584, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 17, 1965.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated January 26, 1965, is reported at 341 F. 2d 29, and also at 51 CCH LC ¶ 19,472 and 58 LRRM 2290. It is set forth in full at Appendix A-1 to A-8. The findings of fact, conclusions of law and order

of the National Labor Relations Board are reported at 146 NLRB No. 62 and are set forth in the Joint Appendix of Petitioner and Respondent in the United States Court of Appeals for the Second Circuit at 1-24. The opinion of the United States District Court for the Eastern District of New York, denying the petition of the Regional Director, Second Region of the National Labor Relations Board for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act, 29 U. S. C. § 160(1), is unofficially reported at 48 CCH LC ¶ 18,458 and 54 LRRM 2287. It is also set forth in the Joint Appendix of Petitioner and Respondent in the United States Court of Appeals for the Second Circuit at 299-308.

Jurisdiction

The decree sought to be reviewed herein was dated and entered in the United States Court of Appeals for the Second Circuit upon the petition of the National Labor Relations Board on February 17, 1965 and is set forth at Appendix B-1 to B-2. The jurisdiction of this Court to review that decree by writ of certiorari is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Is it an unfair labor practice under Section 8(b)(4) for a union to protect the interests of all the employees in a multi-employer bargaining unit by defensive activity, including picketing, against two employer members of the unit whose actions violate a provision in an industry-wide agreement designed to protect job opportunities and employment standards throughout the unit, where the union's activity results in a severance of business relations between the two employers?

2. Is an employer whose business is closely intertwined and whose operations are completely integrated with another employer in the same industry and the same collective bargaining unit, with whom their common union has a dispute, a "primary" employer for the purposes of Section 8(b)(4)?

Statute Involved

The statute involved is the National Labor Relations Act, as amended, Section 8(b)(4)(i) and (ii)(B), 29 U. S. C. § 158(b)(4)(i) and (ii)(B), which, in pertinent part, provides:

> "Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • •
>
> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: • • • (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; • • •"

Statement of the Case

Petitioner Milk Drivers and Dairy Employees Local Union No. 584, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is the collective bargaining representative for employees working in the New York metropolitan area milk industry (J.A. 7).* At the time of the instant dispute, Old Dutch Farms, Inc. (Old Dutch), the charging party, and Balsam Farms, Inc. (Balsam), the alleged secondary employer, were members of an industry-wide collective bargaining unit and covered by an industry-wide collective bargaining agreement (Appendix A-3; J.A. 8; 42, 65, 170, 172-183, 182).

Old Dutch and Balsam were closely intertwined entities located at the same address and engaged in a completely integrated operation. Balsam processed and bottled milk for itself and other distributors, including Old Dutch (J.A. 6; 47, 64, 66, 79-80, 170-172).

Section 66A of the collective bargaining agreement expressly stated that it would be a violation of the contract "for employers to establish, service, or deliver to depots for the purpose of distributing or selling milk." (J.A. 229). This provision was originally included in the agreement to protect job opportunities and employment standards in the industry-wide unit, which were threatened by increasing milk distribution through "depots" (J.A. 271-274, 282). The jobs threatened were those of the traditional "milkman," described in the collective bargaining agreement as a "routeman" (J.A. 198-199). Milk "depots" or "stores"

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* References designated "J.A." are to the Joint Appendix of Petitioner and Respondent in the Court of Appeals. References designated "J.A." should be distinguished from references to "Appendix," which are to the Appendix to this Petition. Whenever a semicolon appears in a series of references, references preceding the semicolon are to the Board's findings.

result in the elimination of these jobs and also destroy established standards of employment (J.A. 129-134).

A number of milk distributors, including Old Dutch, opened over forty "depots" or "stores" in open defiance of Section 66A (J.A. 5, 6, 8; 41-42, 57-59, page following 166). The Union opposed the operation of these "stores" and sought to close them (J.A. 9, 10, n. 2; 66-68, 93-95, 106-107, 129-138, 292-294). The Union also commenced arbitration proceedings alleging violation of 66A (J.A. 5, 9; 158, 169, 106). Old Dutch refused to close its "store" and the Union, on May 27, 1963, requested Balsam not to process any milk for Old Dutch (J.A. 9-10; 69). However, Balsam permitted Old Dutch to withdraw milk from its refrigerators (J.A. 10; 48, 69) and this precipitated a strike.

Old Dutch filed an unfair labor practice charge with the National Labor Relations Board (the Board) alleging a violation of Section 8(b)(4) and a complaint was issued on June 26, 1963. The Regional Director of the Board petitioned the United States District Court for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act (the Act), 29 U. S. C. § 160(1), which was denied (J.A. 167-182, 299-308). Judge John F. Dooling, Jr. held:

> "In these circumstances the conclusion reached is that the nature and extent of Balsam's interest in the basic dispute, the nature and extent of its connection with the challenged 'store' and the general industry-wide effect of alleged irregular 'store' operations combine to make the dispute common to both Balsam and Old Dutch and the strike action taken in consequence primary as to each employer." (J.A. 307).

Subsequently, the Board Trial Examiner found that the Union had violated Section 8(b)(4) of the Act (J.A. 3-25).

His findings, conclusions and recommended order were adopted by the Board (J.A. 1-2).

The Court of Appeals for the Second Circuit, upon a petition for enforcement filed by the Board, agreed that Balsam and Old Dutch were members of the industry-wide bargaining unit, but disagreed with the Union's contention that this activity was lawful because its purpose was to protect employment opportunities and work standards within the bargaining unit. Appendix A-7; 341 F. 2d at 32-33. The Court of Appeals also held that the integration of Balsam and Old Dutch was "an improper basis for concluding that both have primary employer status under the secondary boycott provisions." Appendix A-5; 341 F. 2d at 32. The Court granted enforcement to the order proposed by the Board (J.A. 25, Appendix A-8).

Reasons for Granting the Writ

Question 1:

The first issue presented by this case involves important questions of federal law and national labor relations policy regarding multi-employer collective bargaining units which have not been, but should be, decided by the Supreme Court. The decision of the Court of Appeals fails to follow applicable principles set forth by the Supreme Court in *NLRB* v. *Truck Drivers Local Union No. 449* (*Buffalo Linen*), 353 U. S. 87 (1957) and *NLRB* v. *Brown*, 380 U. S. — (1965), 85 S. Ct. 980, and is in conflict with these decisions. The Court of Appeals also has improperly extended principles of law enunciated in *Local 1976, United Bhd. of Carpenters* v. *NLRB* (*Sand Door*), 357 U. S. 93 (1958), to a situation involving union activity to enforce a job and work standards protection clause within a collective bargaining unit.

"Collective bargaining between multi-employer associations and unions (representing employees of all the employers who are members of the particular associa-

tions)," according to a recent Congressional report, "is now an established practice within labor management relations." Report of the General Subcommittee on Labor, Committee on Education and Labor of the House of Representatives, *Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process*, 88th Cong., 2d Sess. 3 (Comm. Print 1965) (hereinafter "*House Report*").

The Committee found that labor and management prefer multi-employer bargaining, are increasing its use for many reasons (*House Report* 10-19), and that one of the most important advantages of multi-employer collective bargaining was in contract administration, stating:

> "By creating a uniform contract the multi-employer association is usually able to rely upon the union to see to it that no single employer gains an advantage by failing to adhere to its terms.
>
> "Perhaps the greatest impact in terms of stabilizing relations between the specific employees and employers covered by multi-association-union contract is the orderly and uniform interpretation and administration of the contract." *House Report* 13.

The Supreme Court, in *Buffalo Linen*, also discussed the importance of multi-employer bargaining in modern labor relations, but the Court has not previously determined the extent to which Section 8(b)(4) permits or precludes union activity within a multi-employer unit to protect the interests of all the employees in the unit by defensive activity against employer members of the unit whose actions have a deleterious effect upon uniform unit-wide job opportunities and working conditions bargained for by the union and threaten the integrity of the bargaining unit. On this issue, the Court of Appeals stated:

> " • • • Congress intended to preserve the employer's right in each and every case to choose between joining and not joining the boycott. This right to choose which Congress has granted the secondary employer is not to be ignored simply

> because the former is a member of the same multi-employer bargaining unit as the primary employer and because it has violated the union agreement." Appendix A-7, 341 F. 2d at 33.

It is the Union's position that this decision jeopardizes the collective bargaining agent's ability to achieve uniform administration of multi-employer collective bargaining agreements. Uniform administration requires that a union respond effectively to attempts by individual employers or groups of employers within a multi-employer unit to evade unit standards which protect employees throughout the bargaining unit, rather than the employees of any particular employer. The decision below, which ignores the industrial realities of multi-employer bargaining and contract administration, should be reviewed in the interest of a sound national labor relations policy.

The Supreme Court, in *Buffalo Linen* and more recently in *NLRB* v. *Brown, supra,* recognized the importance of preserving the integrity of a multi-employer bargaining unit by defensive action, holding that employers may lawfully prevent the disintegration of the bargaining unit by taking defensive action against a union conducting a "whipsaw" strike. In both cases, the Court, balancing the conflicting interests between the right to strike and the interest of the employers in preserving the integrity of the bargaining unit, concluded that employer defensive action to prevent the disintegration of the unit was lawful. See also *New York Mailers' Union Number Six* v. *NLRB,* 327 F. 2d 292 (2nd Cir. 1964) and *Natkin & Co. and Robert L. Dericks,* 150 NLRB No. 150 (1965).

In the instant case, the facts demonstrate that the Union reacted to employer practices which both violated the agreement and threatened the destruction of uniform industry-wide standards and the collective bargaining unit. The facts further indicate that the Union's defensive response was directed at preserving industry-wide job

opportunities and employment standards bargained for on a multi-employer basis and preventing the breaking up of the single industry-wide bargaining unit into a series of single employer or smaller multi-employer units. *Cf. United Mine Workers (Bituminous Coal Operators Ass'n)*, 148 NLRB No. 31 (1964).

The Union has contended throughout this case that Section 8(b)(4) should not be literally construed, but that 8(b)(4) must be interpreted on a cautious case-by-case basis. See *Local 1976, United Bhd. of Carpenters* v. *NLRB (Sand Door)*, *supra*, 357 U. S. at 98; *Local No. 24, IBT* v. *NLRB*, 266 F. 2d 675, 680 (D. C. Cir. 1959); *Seafarers Int'l Union* v. *NLRB*, 265 F. 2d 585, 591 (D. C. Cir. 1959); *Truck Drivers Local No. 728, IBT* v. *Empire State Express, Inc.*, 293 F. 2d 415 (5th Cir. 1961). The Supreme Court has observed that the distinction between legitimate and unlawful activity under Section 8(b)(4) "does not present a glaringly bright line," *Local 761, Int'l Union of Electrical Workers* v. *NLRB*, 366 U. S. 667, 673 (1961), stating:

> "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer." *Id.* at 674.

And, the legislative history of Section 8(b)(4) indicates it was intended to protect only genuinely "neutral" employers. See *Truck Drivers Local No. 728, IBT* v. *Empire State Express*, 293 F. 2d 415, 422 (5th Cir. 1961).

The decisions of the Board and Court of Appeals disregard the competing factors involved in this case and ignore the principle expressed in *Buffalo Linen* and *Brown* that activity undertaken to preserve the integrity of multi-employer bargaining should be examined by balancing the conflicting interests involved in the dispute. This balancing concept, as shown above, applies to cases under Section 8(b)(4). Here, the Union had a legitimate interest in

bargaining for and acting to preserve job opportunities and employment standards in an appropriate collective bargaining unit. See *Meat and Highway Drivers, Local 710* v. *NLRB*, 335 F. 2d 709, 713 (D. C. Cir. 1964); *Orange Belt District Council of Painters No. 48* v. *NLRB*, 328 F. 2d 534, 538 (D. C. Cir. 1964); *United Dairy Workers, Local No. 83 and Arthur Elias (National Dairy Products Corp.)*, 146 NLRB No. 88 (1964); *Milk Wagon Drivers and Dairy Employees Union Local 603 (Drive-Thru Dairy, Inc.)*, 145 NLRB 445 (1963). The Board and the Court of Appeals, however, did not balance the Union's legitimate interests and defensive reaction to employer threats to unit-wide job opportunities, standards of employment and the integrity of the industry-wide bargaining unit against an offending employer's (Balsam) interests as an alleged "neutral" under Section 8(b)(4), but decided the case by mechanically applying inappropriate precedents.

Moreover, the decision below establishes an unreasonable double standard for activity to preserve multi-employer bargaining; employer activity is protected pursuant to *Buffalo Linen* and *Brown*, but a union motivated by similar goals commits an unfair labor practice. Under these circumstances, the principle that a union may lawfully take action within a multi-employer unit to prevent the disintegration of industry-wide job opportunities and standards for which it has bargained and to preserve the integrity of the multi-employer unit should be reviewed and affirmed by the Supreme Court. The contrary views of the Board do not preclude such a review in this area. *NLRB* v. *Brown, supra*, 380 U. S. at —, 85 S. Ct. at 988.

The Board and Court of Appeals also relied upon the *Sand Door* decision, 357 U. S. 93 (1958), stating that the decision proscribed the Union's conduct even if Old Dutch and Balsam were violating Section 66A of the agreement. *Sand Door*, which held that otherwise unlawful secondary activity does not become lawful because the objective is

enforcement of a lawful contract clause, should not be extended to a situation where union activity is restricted to enforcement of a job opportunity and employment standards protection clause within a multi-employer collective bargaining unit and is intended to preserve the integrity of the unit. This erroneous extension of the *Sand Door* doctrine to activity within a single collective bargaining unit threatens all union activity within multi-employer units and should be reviewed and rejected by the Supreme Court.

If multi-employer bargaining is to be meaningful, all employer members of a multi-employer unit covered by an industry-wide collective bargaining agreement must be considered "primary" if such employers participate in any degree in a chain of conduct which violates the job and work standards protection provisions of the contract. Such employers should not be protected from the natural consequences of their conduct by the mechanical application to them of the epithet "secondary."

Question 2:

A second important question of federal labor law involved in this case is whether the peculiarly integrated structure of the metropolitan New York milk industry and the Old Dutch-Balsam relationship results in Balsam being a "primary" employer for the purposes of Section 8(b)(4), apart from the foregoing considerations.

A recent arbitration award, in which the single issue was what provisions regarding company stores and outlets should be included in the 1963-1965 Milk Industry Collective Bargaining Agreement, found that such intertwined relationships, which cross employer and corporate boundaries and call for closely related operations, are typical of the metropolitan milk industry:

> "The milk industry in the metropolitan area is composed of approximately 250 companies of vary-

ing size engaged in both the production and distribution of milk and milk products. Both phases are closely inter-related and the relationship crosses individual employer and corporate boundaries. To sell milk at wholesale or retail, a company must under city and state law have a home location at a licensed site. But more than one dealer can use the same pasteurizing and bottling plant as a home site. Frequently, many milk dealers will use a single location. These may include one or more production entities and any number of distribution entities. Separate corporate lines are drawn for tax, licensing, and other purposes but the operation in its totality is closely interwoven. These arrangements tend to intensify competition since they permit the introduction of new corporate entities into the milk business without substantial capital investment in bottling, pasteurizing and cold storage plant and equipment. They also, according to the unions, open the door to violations of the collective bargaining agreement usually under the pressure of achieving a competitive advantage." *In re Milk Industry and Milk Drivers Locals 584, 602 and 607, IBT* (Arbitrators Theodore W. Kheel, George Moskowitz and Eric J. Schmertz), 42 LA 893, 896 (1964).

The Court of Appeals, relying upon *NLRB* v. *Denver Building and Construction Trades Council*, 341 U. S. 675 (1951), held that "the integration of Balsam and Old Dutch operations on a merely functional plane is an improper basis for concluding that both have primary employer status under the secondary boycott provisions." Appendix A-5, 341 F. 2d at 32. The Court also stated:

> "It is only where there exists a community of interests between the two employers, where the two employers are united by family ties, common ownership, or joint control, that the two can rightfully be treated as one for the purpose of § 8(b)(4)(i) and (ii)." Appendix A-6; 341 F. 2d at 32-33.

It is submitted that the question of whether the Union's conduct was lawful should not be determined by applying such legal shibboleths as "family ties" or "common ownership" where they are completely inappropriate, but that "the answer must be derived by applying the intent of the statute to the facts in the case." *Local No. 24, IBT* v. *NLRB, supra,* 266 F. 2d at 680. In such cases, the Court should disregard legalistic terms and must participate in the "evolutionary process" described by the Supreme Court in *Local 761, Int'l Union of Electrical Workers* v. *NLRB, supra,* 366 U. S. at 674. Several decisions of lower courts and the Board illustrate that an employer is not a "neutral" when the facts indicate an actual unity of interest or community of interest between employers involved in controversial union activity. See *Local No. 24, IBT* v. *NLRB, supra; Truck Drivers Local No. 728, IBT* v. *Empire State Express, supra; Building Service Employees Int'l Union* v. *NLRB,* 313 F. 2d 880 (D. C. Cir. 1963); *Kaynard* v. *Local 282, IBT,* 200 F. Supp. 505 (EDNY 1962); *Local 282, IBT (Acme Concrete & Supply Corp.),* 137 NLRB 1321 (1962).

The decision below disregards the fact that the employers involved are merely convenient "corporate lines" in a peculiarly integrated operation and industry and erroneously extends the *Denver Building and Construction Trades Council* decision, which should be confined to genuine "independent contractor" situations. This decision does not advance the policy of Section 8(b)(4)—to protect genuinely neutral employers—and constitutes a severe limitation, unsupported by any other public policy, upon the activities of collective bargaining representatives. In the interest of a sound national labor relations policy, the Supreme Court should review the decision of the Court of Appeals and reverse the unwarranted extension of Section 8(b)(4) to the activities of the Union in this dispute.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix A

(Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 288—September Term, 1964.

(Argued January 12, 1965 Decided January 26, 1965.)

Docket No. 29130

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

Before:

SMITH, KAUFMAN and ANDERSON,

Circuit Judges.

Petition by the National Labor Relations Board for enforcement of its order, 146 NLRB No. 62, based on findings that respondent violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 29 U. S. C. § 151 et seq. Enforcement ordered.

MELVIN J. WELLES, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate Gen-

eral Counsel, Marcel Mallet-Prevost,. Asst. General Counsel, and Linda R. Sher, Attorney, NLRB, on the brief), *for petitioner.*

BRUCE H. SIMON, New York, N. Y. (Robert S. Savelson, and Cohen & Weiss, New York, N. Y., on the brief), *for respondent.*

SMITH, *Circuit Judge*:

The National Labor Relations Board petitions for enforcement of its order 146 NLRB No. 62 based on findings that Milk Drivers Local 584 violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(i) and (ii)(B),[1] by inducing employees of neu-

---

[1] (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

tral employers to engage in work stoppages, and by threatening and coercing persons engaged in commerce, with an object of forcing a neutral employer, Balsam Farms, Inc., to cease doing business with Old Dutch Farms, Inc. We find that the Board's findings are supported by substantial evidence on the record as a whole, and that Local 584 is not excused from the secondary boycott provisions of the Act by its collective bargaining agreement. We grant enforcement of the Board's order.

The Trial Examiner found that the Union had violated § 8(b)(4)(i)(B) and § 8(b)(4)(ii)(B) of the NLRA by coercing neutral employers and employees of neutral employers with an object of forcing these employers to cease doing business with the primary employer, Old Dutch. The Board adopted the findings, conclusions and recommendations of the Examiner. Old Dutch is a distributor of milk, employing eight drivers on four routes, and is a member of a multi-employer bargaining unit which had then and still has a collective bargaining agreement with the Union. Milk was purchased independently by Old Dutch, which has no bottling facilities of its own, and was pasteurized and bottled by a larger distributor, Balsam Farms, also a member of the bargaining unit. Balsam performs similar services for other distributors in the area and in the case of Old Dutch provides it with office and parking space in and around the Balsam building. Rental and service charges are based solely on the quantity of Old Dutch milk bottled by Balsam.

Clause 66A of the Union contract provided that it would be a violation of the agreement for any signatory thereto to distribute milk to "depots" for the purpose of selling milk. That clause was incorporated in the agreement because the Union feared that other means of distributing the milk would cause a decrease in the route business and thereby jeopardize the jobs of the driver-salesmen repre-

sented by the Union. But in apparent disregard of this prohibition, many of the member milk dealers, including Old Dutch, opened up retail stores where milk was sold at retail prices along with many other grocery items. The Union opposed these stores vehemently and was successful in convincing several distributors to close them. However, Old Dutch refused, and the Union invoked the contract's arbitration clause. Before the actual arbitration hearing was to have been held, the Union instructed Balsam employees, who had continued to handle Old Dutch milk, among others, to walk off their jobs. A short while later pickets appeared carrying signs which read, "Unfair, milk company stores violated contract, and destroy job security," and, "On strike. Unfair to Union members Local 584, IBT." The signs did not identify the employer being picketed. Drivers making deliveries to the Balsam plant refused to cross the lines.

The Union, Old Dutch, Balsam and others met that same day. In the course of the negotiations, the Union made it clear that its purpose was to close the Old Dutch store and that it would picket Balsam in an effort to achieve that aim. Balsam objected on the ground that it was outside the dispute; the Union compromised by agreeing to remove the pickets if Balsam would agree to stop processing Old Dutch milk, and Balsam acquiesced. For several days thence Balsam did not handle Old Dutch milk.

Old Dutch and the Union finally reached an agreement whereby Old Dutch would raise the price of the milk distributed by its retail store. Shortly thereafter, Old Dutch instituted the unfair labor practice charge against the Union giving rise to this action. The Regional Director of the Board at once proceeded under § 10(1) to seek an injunction, stating that he had reasonable cause to believe that the charge was true. In denying the request for the injunc-

tion, Judge Dooling, in a reasoned opinion, concluded that Balsam was not a "neutral" employer and that there was a "community of interest" between Balsam and Old Dutch. The Trial Examiner disagreed with Judge Dooling's conclusions. He ruled that clause 66A and the purpose behind its inclusion, as well as the potential threat to the drivers' job security posed by Balsam's continuing to process Old Dutch milk, and the functional integration of the Balsam and Old Dutch operations, were not grounds for the making of an exception to the Act and holding the conduct permissible when the picketing fell so clearly within the secondary boycott provisions. The Board agreed, taking the position that once the activity comes within the secondary boycott prohibition, it is conduct violative of the Act that cannot be justified by such explanations as prior violation of the collective bargaining agreement, the maintenance of general union policies, or functional integration of the primary and secondary employers.

In this the Board is correct. It is not necessary to find that the sole object of the strike was that of forcing the "neutral" employer to cease doing business with the "primary" employer. *NLRB* v. *Denver Building and Construction Trades Council*, 341 U. S. 675 (1951). Thus, the fact that the Union was striking Balsam in an effort to sustain its overall policy of providing job security for its members does not validate its illegal objective of coercing Balsam to cease doing business with Old Dutch—the controversy was limited to Old Dutch's retail shop with respect to the Union's immediate objectives.

Second, the integration of Balsam and Old Dutch operations on a merely functional plane is an improper basis for concluding that both have primary employer status under the secondary boycott provisions. That approach has been expressly rejected by the Court. *NLRB* v. *Denver Building and Construction Trades Council, supra.* As in

Denver Building and Construction Trades Council, we have two *independent contractors* who are operating from the same situs—the relationship between the two concerns is one of merely "doing business." Since the object of every secondary boycott is really to cause a cessation of business between two independent companies, the Labor Act's prohibitions would be nullified if a union were allowed to claim that the very business relationship it seeks to end makes both parties "primary" employers. It is only where there exists a community of interests between the two employers, where the two employers are allied by family ties, common ownership, or joint control, that the two can rightfully be treated as one for the purpose of § 8(b)(4)(i) and (ii). See *NLRB* v. *Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, etc.*, 299 F. 2d 636 (2 Cir. 1962); *Drivers and Chauffeurs Local Union No. 816, etc.* v. *NLRB*, 292 F. 2d 329 (2 Cir.), cert. den. 368 U. S. 953 (1961). And this is not a case where the work being performed by the secondary employer is work which, but for the Union's dispute could have been done by the primary employer's employees. See *NLRB* v. *Business Machine and Office Appliance Mechanics Conference Board, etc.*, 228 F. 2d 553 (2 Cir.), *cert. den.* 351 U. S. 962 (1955).

Furthermore, the fact that Old Dutch or Balsam may have been violating the terms of the collective bargaining agreement does not justify the Union's action. What is unlawful secondary picketing cannot thereby be converted into lawful primary picketing. The Supreme Court has held that union conduct which would unquestionably be a violation of § 8(b)(4)(A) by itself cannot be removed from the Act's proscription by a blanket clause in the collective agreement authorizing such conduct; in other words, the conduct is still unlawful even though not to permit it would result in a violation of the union contract. *Local 1976, United Brotherhood of Carpenters and Joiners* v. *NLRB*

(*Sand Door*), 357 U. S. 93 (1958). There the secondary employer had agreed to a "hot cargo" clause in its contract but reneged in a specific situation when the union requested it not to handle the goods of a primary employer which the union had struck. The "hot cargo" clause was not a bar to the secondary employer's refusal to participate in the boycott because Congress intended to preserve the employer's right in each and every case to choose between joining and not joining the boycott. This right to choose which Congress has granted the secondary employer is not to be ignored simply because the former is a member of the same multi-employer bargaining unit as the primary employer and because it has violated the union agreement. Similarly, in *NLRB* v. *Bangor Building Trades Council*, 278 F. 2d 287 (1 Cir. 1960), the First Circuit held that a contract cannot be enforced by the means specifically prohibited in § 8(b)(4)(A). Other circuits are in accord. See *NLRB* v. *International Union of Operating Engineers*, 293 F. 2d 319 (9 Cir. 1961) (fact that secondary employer had breached its contract with the union did not justify the union's secondary boycott of it); *Local No. 5, United Ass'n of Journeymen* v. *NLRB*, 321 F. 2d 366 (D. C. Cir.), cert. den. 375 U. S. 921 (1963). Although Balsam was party to the contract, so far as Old Dutch's store was concerned Balsam was a secondary employer. Judge Dooling seemed to intimate that there was common control, but evidence of such common control is lacking in the record.

The only remaining question is whether the Board's order is too broad. The Board adopted the Trial Examiner's recommended order which required the Union to cease inducing or encouraging employees of Balsam or any other employee to engage in strikes, etc., where an object thereof is to force Balsam or any other employer or person to cease doing business with Old Dutch or any other employer with which the Union has a dispute over

the operation of a retail milk store in claimed violation of clause 66A. An order of such breadth was justified in view of the Union's avowed intention to close down the many retail milk shops operated by the bargaining unit's members. Under these circumstances, the Board could anticipate that the Union might engage in similar activity against other neutral employers and was entitled to prevent it. See *NLRB* v. *Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, etc., supra.*

The petition for enforcement of the Board's order is granted.

Appendix B

(Decree)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29130

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

Before: Smith, Kaufman and Anderson, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, representatives, successors and assigns on March 27, 1964. The Court heard argument of respective counsel on January 12, 1965, and has considered the briefs and transcript of record filed in this cause. On January 26, 1965, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the

Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, representatives, successors and assigns abide by and perform the directions of the Board in said order contained.

J. Joseph Smith,
Judge, United States Court of Appeals for the Second Circuit.

Robert P. Anderson,
Judge, United States Court of Appeals for the Second Circuit.

Filed: February 17, 1965.

A true copy,

A. Daniel Fusaro,
Clerk.

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777-534—65

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), Section 8(b)(4)(B)---------- Page 2, 5, 6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 146

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–A8) is reported at 341 F. 2d 29. The Board's decision and order (J.A. 1–24) [1] are reported at 146 NLRB 509.

JURISDICTION

The decree of the court of appeals was entered on February 17, 1965 (Pet. B1–B2). The petition for a writ of certiorari was filed on May 15, 1965. The

[1] "J.A." references are to the portions of the record printed for the use of the court below.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union's strike against one member of a multi-employer unit to force him to discontinue sales to another member of the unit was "secondary," rather than "primary."

2. Whether the relation between the struck employer and the employer with whom the Union had its primary dispute deprived the former of his "neutral" status.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

Old Dutch Farms, Inc. (Old Dutch) is a retail distributor of milk and related products in the New York City area, employing eight driver-salesmen who deliver milk directly to homes on four milk routes (J.A. 42, 81). Since May 1962, it has also operated a retail store at which it sells its own milk products (J.A. 4). Deliveries of milk products to the store are made by an Old Dutch driver (J.A. 42).

Old Dutch purchases its own raw bulk milk, but has no facilities for homogenizing, pasteurizing, or bottling milk. These services are performed for Old Dutch by Balsam Farms, Inc. (Balsam) on a contract basis (J.A. 53). Old Dutch also rents office

and truck storage space from Balsam, as do two other retail milk distributors (J.A. 64). In addition to Old Dutch and its two other tenants, Balsam homogenizes, pasteurizes, and bottles milk for at least four other distributors and for its own use (J.A. 64–66).[2]

Old Dutch and Balsam are parties to identical collective bargaining contracts with petitioner.[3] The basic agreement was negotiated on an industry-wide basis between representatives of the greater New York and Northern New Jersey Milk Dealers Labor Committee and representatives of three local unions, including petitioner. Separate contracts reflecting this agreement were then signed by the individual milk dealers. About 250 milk dealers have signed the same contract (J.A. 28, 42–43).

Clause 66A of the contracts provided that it would be a violation of the agreement for any signatory "to deliver to depots for the purpose of distributing or selling milk" (J.A. 8). In December 1962, petitioner, contending that this clause prohibited the operation of retail stores like Old Dutch's, instituted arbitration proceedings under the contract against

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[2] Old Dutch's raw bulk milk is delivered by tank truck to Balsam's plant and placed in the latter's tanks. It is stored, processed, bottled, and loaded onto Old Dutch's trucks by Balsam. Old Dutch pays Balsam a fixed amount per can for the various services performed. It pays an additional fixed amount per can for rental and storage (J.A. 79–80).

[3] All of Old Dutch's employees except for its four store employees are represented by petitioner. The same is true of Balsam's employees (J.A. 101, 42, 65).

Old Dutch (J.A. 9, 44–45, 165–166, 229).[4] These proceedings were in progress when the strike described below, which forms the basis for the present case, occurred (J.A. 46–47, 59–60).[5]

On May 27, 1963, at about 9:00 a.m., petitioner's vice-president and business agent went to the Balsam loading platform and instructed Balsam's manager not to put up any milk for Old Dutch because "they [petitioner] were going to close the stores, * * *" (J.A. 69). Petitioner's agents took no action until about 10:30 a.m., when the president of Old Dutch and one of his employees began taking Old Dutch milk from Balsam's refrigerator. At that point, petitioner's representatives went inside and conversed with Balsam's employees who were working there. Balsam's employees thereupon struck because Balsam had permitted Old Dutch employees to load milk from Balsam's refrigerator (J.A. 10; J.A. 48, 69–72). As the rest of Balsam's employees came to work, they were met by petitioner's agents, and, instead of reporting for work, they gathered in the parking lot (J.A. 61–62, 70–71). Pickets appeared at Balsam's

[4] Since 1957, approximately 15 milk distributors had established about 40 such stores (J.A. 57–58).

[5] After the strike was ended, the arbitration proceeding involving Old Dutch was merged with an industry-wide arbitration proceeding. The decision of the arbitrators in this latter proceeding, *In re Milk Industry*, 42 Lab. Arb. 893, was issued on May 5, 1964. Respecting the contract provision in question, the arbitrators observed that "the contract * * * was not clear with respect to the type of store about which the Unions are now complaining. It prohibited sales from trucks or milk depots except those in settlement houses and the like, but did not explicitly ban sales at company stores." *Id.* at 895.

two driveways carrying signs which read, on one side, "Unfair, milk company stores violated contract and destroy job security," and, on the other, "On strike. Unfair to Union members Local 584, IBT" (J.A. 62–63, 71–72). During the morning, pursuant to the pickets' instructions, all truck drivers making deliveries to Balsam refused to cross the picket line (J.A. 34; 72–74). The strike was ended that afternoon, when Balsam agreed to petitioner's demand to cease processing milk for Old Dutch because Old Dutch had refused to close its store (J.A. 50–53).[6]

Upon charges filed by Old Dutch, the Board found that petitioner, by its strike activity on May 27, 1963, had violated Section 8(b)(4) (i) and (ii)(B) of the Act. The Board found that petitioner's primary dispute was with Old Dutch, that petitioner had threatened, restrained, and coerced Balsam (which was "neutral"), and that it had induced and encouraged employees of Balsam to strike, all with an object of forcing Balsam to cease doing business with Old Dutch. The Board ordered petitioner to cease and desist from such conduct in the future (J.A. 2, 15–24). The court of appeals sustained the Board's findings and enforced its order (Pet. A1–A8).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. There is thus no occasion for further review.

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[6] Several days later, Old Dutch and the Union arrived at a "truce" when Old Dutch agreed that the store price of milk would be increased (J.A. 55–56).

1. Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a labor organization to bring pressure to bear on a neutral or secondary employer and his employees so as to force that employer to cease doing business with another employer with whom the labor organization has its primary dispute. The Board found (J.A. 18), with the approval of the court of appeals (Pet. A5), that petitioner's primary dispute was with Old Dutch over its operation of a retail milk store. It concluded that since Balsam, Old Dutch's processor, was not involved in the operation of that store, the pressure on Balsam and its employees was "secondary" and thus violative of Section 8(b)(4)(B).

There is no merit to petitioner's contention that it was entitled to bring pressure on Balsam because Balsam and Old Dutch belong to the same multi-employer unit and Old Dutch's retail store operation imperiled job opportunities and employment standards in that unit in violation of clause 66A of the collective agreement which both had signed (Pet. 6–11). First, as the Board noted, Balsam's conduct did not violate any terms of the contract; Balsam did not "establish, service or deliver to depots for the purpose of distributing or selling milk," but merely continued to process milk for one of its many customers (J.A. 17; and see the arbitration decision, note 5, *supra*). Whether or not the customer violated the contract would not affect petitioner's right to strike Balsam. Second, even if the clause had barred Balsam from processing milk for any member of the multi-employer unit who operated a retail store, it

would not follow that pressure on Balsam to enforce that clause would be permissible. As this Court held in *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, a contract provision cannot convert conduct which would otherwise violate the secondary boycott provisions of the Act into primary conduct.[7] The determinative question is whether the contract provision bears directly on the employment conditions of the employer against whom the pressure is exerted, or whether it is really aimed at those of other employers with whom he happens to do business. If the latter be true, the clause is "secondary." See *Local 636, United Ass'n* v. *National Labor Relations Board*, 278 F. 2d 858, 864 (C.A. D.C.). Since Balsam did not establish and was not operating the offending retail store, a clause which sought to restrict his sales to that store was not aimed at Balsam's employment conditions but at those of some other employer, in this case Old Dutch. The enforcement of such a clause by pressure against Balsam was therefore barred by Section 8(b)(4)(B).

Nor is it relevant that the Union's ultimate object in enforcing such a clause may have been the perfectly legitimate one of preserving work opportunities for all members employed by those in the bargaining unit. The Union may not attain this object

[7] See also *National Labor Relations Board* v. *Bangor Building Trades Council*, 278 F. 2d 287 (C.A. 1); *Local 636, United Ass'n* v. *National Labor Relations Board*, 278 F. 2d 858 (C.A. D.C.); *Local 5, United Ass'n* v. *National Labor Relations Board*, 321 F. 2d 366 (C.A. D.C.), certiorari denied, 375 U.S. 921; *National Labor Relations Board* v. *Enterprise Association, Etc.*, 285 F. 2d 642 (C.A. 2).

by a means which the Act proscribes, *i.e.*, by striking an employer, who, even though he may be in the same unit, did not cause the dispute and is powerless to affect it except by discontinuing business relations with the employer who did. See *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675, 688–689.

The decision below is not inconsistent with *National Labor Relations Board* v. *Truck Drivers Union No. 449*, 353 U.S. 87, and *National Labor Relations Board* v. *Brown*, 380 U.S. 278 (Pet. 6–8). In those cases, the Court found that the means used by the non-struck members of a multi-employer unit to defend the integrity of that unit (a temporary layoff in *Truck Drivers*, and the hiring of temporary replacements in *Brown*) were permissible under the Act. In this case, however, petitioner did not strike Balsam on the theory that a contract violation by any one employer is a violation by all those in the unit. Whatever may be the law in that situation, it does not apply when, as here, the purpose of the strike is to cause the second employer to cease dealing with the first.

2. There is no substance to petitioner's argument (Pet. 11–13) that, because Balsam was performing work for Old Dutch on the same premises, the two should be regarded as one employer for purposes of Section 8(b)(4)(B). That contention was expressly rejected in *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675, 689. As the court below pointed out (Pet. A–6), that case holds that when, "we have two *independent contractors* who are oper-

ating from the same situs—the relationship between the two concerns is one of merely 'doing business'." The cases cited by petitioner (Pet. 13) are distinguishable, for in those situations, unlike here, the two employers were allied by family ties, common ownership, or joint control (see Pet. A–6).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1965.

END